trials have been presumptively open"); *Id.* at 599 (Stewart, J., concurring) ("The First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal."); *Press-Enterprise II*, 478 U.S. at 27 (Stevens, J., dissenting) ("[T]he logic of the Court's access right extends beyond the confines of the criminal justice system to encompass proceedings held on the civil side of the docket . . .").

Many lower courts have reached the conclusion that the constitutional right of access to criminal proceedings applies to civil proceedings because the same rationales pertain. *See, e.g., Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *Brown & Williamson Tobacco Corp. v. Federal Trade Commission*, 710 F.2d 1165 (6th Cir. 1983); *Westmoreland v. Columbia Broadcasting System, Inc.*, 752 F.2d 16 (2d Cir. 1984).

As with criminal proceedings, access to civil proceedings "plays a particularly significant role in the functioning of the judicial process and the government as a whole." *Publicker*, 733 F.2d at 1070 (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 606). "Public access to civil trials enhances the quality and safeguards the integrity of the factfinding process,' 'fosters an appearance of fairness,' heightens 'public respect for the judicial process,' and 'permits the public to participate in and serve as a check upon the judicial process — an essential component in our structure of self-government.'" *Id.*

Additionally, civil cases often involve issues that are crucial to the public — whistleblower actions against large corporations, discrimination class actions, mass tort litigation — all concern issues that affect the public at large because they contain allegations of wrongdoing that have a broad effect. Public scrutiny is needed to expose any unjust acts committed by the parties, and to ensure that the courts are

performing their role as prescribed. "The concern of Justice Brennan that secrecy eliminates one of the important checks on the integrity of the system applies no differently in a civil setting. In either the civil or the criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption." *Brown & Williamson*, 710 F.2d at 1179.

Finally, the principle underlying the First Amendment right of access that "a major purpose of that Amendment was to protect the free discussion of governmental affairs," applies to both criminal and civil proceedings. *Westmoreland*, 752 F.2d at 22 (citing *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). When courts close civil proceedings that involve allegations of government misconduct, they deprive the public of information needed to evaluate governmental affairs and weigh in if needed. When courts are sealed, the public may suspect the worst and lose faith in their government simply because they are prohibited access. *See Richmond Newspapers*, 448 U.S. at 572 ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.").

B. The rationale behind a presumptive right of access applies to appellate oral arguments, even when national security interests are involved.

Courts have extended the constitutional right of access to appellate oral arguments under the same rationale on which this Court premised a right of access to criminal trials. *See, e.g., United States v. Moussaoui*, 65 Fed. Appx. 881, 890, 2003 WL 21076836 (4th Cir. 2003) (Appellate oral arguments "have historically been open to the public, and the very considerations that counsel in favor of openness of criminal trial support a similar degree of openness in appellate proceed-

ings."); *Doe v. United States*, 253 F.3d 256 (6th Cir. 2001); *In re Grand Jury Proceedings*, 983 F.2d 74, 75 (7th Cir. 1992) (refusing to seal appellate arguments on the basis that "[w]hat happens in the halls of government is presumptively open to public scrutiny.").

In *Moussaoui*, the Fourth Circuit rejected the government's request to completely seal oral arguments to protect classified information to protect the interests of the press and public. The court explained: "The value of openness in judicial proceedings can hardly be overestimated. 'The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.'" *Moussaoui*, 65 Fed. Appx. at 885 (citing *Union Oil Co. v. Leavell*, 220 F.3d 562, 578 (7th Cir. 2000)). *See also In re Grand Jury Proceedings*, 983 F.2d at 75; *Doe*, 253 F.3d at 262.

The public interest in access to appellate arguments is at least as high as in access to lower court proceedings. At the appellate level, the lower court's reasoning is reviewed. Publicity ensures that the public can evaluate the merits of each party's position and the appellate court's holding. This scrutiny contributes to the quality and integrity of the appellate process, which is crucial to the preservation of justice. In appellate cases that involve allegations of government wrongdoing, public scrutiny is essential to protect against corruption or incompetence.

C. The procedural safeguards found to be essential in the criminal context also apply to civil appellate proceedings.

In this case, the D.C. Circuit made no attempt to explain

why public access would be denied. However, other circuits have recognized that specific findings are necessary. The U.S. Court of Appeals for the Eleventh Circuit described the type of procedural safeguards that it believed must be put in place before closing a civil proceeding:

> There is nothing in this record that supports the closing of these proceedings to the press and public. The district court did not hold any hearing after proper notice, nor did it enter findings that justify any restrictions on public access to the proceedings. *See Globe Newspaper Co. v. Superior Court*, 102 S. Ct. at 2622, n.25 (the press must be afforded an opportunity to present its case for an open proceeding); *Gannett Co. v. DePasquale*, 443 U.S. at 401 (Powell, J., concurring) (same). *See also* Note, All Courts Shall Be Open: The Public's Right to View Judicial Proceedings and Records, 52 Temp. L.Q. 311, 332 (1979). We commend to the trial courts the same procedure that has been recommended in a fair trial-free press context. *See* ABA, Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press (1976).
>
> Other procedures also might accomplish the purpose. . . . We do not bind the district courts to the formality of any set procedure. But the issue must be squarely confronted and those with various interests must be given the opportunity to be heard.

Newman v. Graddick, 696 F.2d 797, 802 (11th Cir. 1983); *see also Publicker Indus.*, 733 F.2d at 1070 (holding that before a court closes a civil courtroom it must show that a denial serves an important government interest, that no less restrictive way exists to serve that government interest, and that the court has made record findings in order to facilitate meaningful governmental review).

Even when national security is concerned, before closing a proceeding, appellate courts must make specific findings that demonstrate that closure is narrowly tailored to protect a compelling government interest. In *Moussaoui*, to protect the guaranteed "right of access by the public to oral arguments in the appellate proceedings of this court" while preserving national security interests, the Fourth Circuit ordered a bifurcated argument. *Moussaoui*, 65 Fed. Appx. at 890. "Should counsel believe that reference to classified information is necessary, such a discussion will be reserved to the second part of oral argument, which will be conducted in a sealed courtroom." *Id.* To protect the interests of the public and press in the sealed hearing, the court also ordered a release of a redacted transcript of the sealed hearing after the argument concluded.

CONCLUSION

The Court of Appeals ruling ignores the now-well-established public interests affected by any court closure decision. Closing cases that involve allegations of government wrongdoing leads to increased public interest in what takes place behind closed doors, fosters public doubts about the private justice that certain people and entities get in the public courts, harms public debate about the issues involved in the litigation, and perhaps most devastatingly fosters an appearance of unfairness, that the government can close off access to the public courts when it is under fire.

This Court should not allow courts to deny access to civil cases that involve allegations of government wrongdoing with no specific, on-the-record findings, in large part because of the devastating impact that such a holding would have on public confidence in the fairness and accountability of the justice system and the government. The courts must articulate

when the government's interest in protecting state secrets outweighs the public's right to access.

LUCY A. DALGLISH
Counsel of Record
GREGG P. LESLIE
SUSAN BURGESS
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
(703) 807-2100

October 17, 2005

Additional attorneys listed in Appendix B

APPENDIX A

Descriptions of *amici*:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interest of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The American Society of Newspaper Editors is a professional organization of approximately 750 persons who hold positions as directing editors of daily newspapers in the Untied States and Canada. The purposes of the Society include assisting journalists and providing and unfettered and effective press in the service of the American people.

The Associated Press is a global news agency with headquarters in New York City and bureaus in every state and in more than 100 foreign countries. AP gathers and delivers news reports in text, photographic, audio and video formats to thousands of subscribing, print, broadcast and multimedia news organizations and other customers worldwide.

Bloomberg News is a 24-hour global news service with more than 1800 journalists in 108 bureaus around the world, including a fulltime bureau in Washington, D.C. Bloomberg News supplies real time business, financial and legal news to more than 200,000 subscribers world-wide. As a wire service, Bloomberg provides news to more than 350 newspapers globally, and also provides daily radio and television programming throughout the world through its 750 radio affiliates. Bloomberg News also operates eleven 24-hour cable news television outlets globally, which often brings to the public video coverage of important trials in the public

interest. Bloomberg also publishes four monthly magazines. Its Bloomberg Press division publishes more than 50 book titles each year.

Cable News Network LP, LLLP, a division of Turner Broadcasting System, Inc., a Time Warner Company, is one the world's most respected and trusted sources for news and information. Its reach extends to 15 cable and satellite television networks; 12 Internet websites, including CNN.com; three private place-based networks; two radio networks; and CNN Newsource, the world's most extensively syndicated news service. CNN's combined branded networks and services are available to more than 1 billion people in more than 212 countries and territories.

Daily News L.P. publishes the New York *Daily News*, which is one of the largest newspapers in the United States and has a daily circulation of more than 700,000, primarily in the New York City metropolitan area.

Los Angeles Times Communications LLC, dba Los Angeles Times, a wholly owned subsidiary of Tribune Company, publishes the *Los Angeles Times*, the largest metropolitan daily newspaper circulated in California, as well as the *Laguna Beach Coastline Pilot*, *Newport Beach-Costa Mesa Daily Pilot*, *Glendale News Press*, *Burbank Leader*, *La Canada Valley Sun*, *La Crescenta Valley Sun*, and the *Huntington Beach Independent*.

The New York Times Company publishes *The New York Times*, a daily newspaper with a national circulation of 1.1 million daily and more than 1.7 million on Sunday. The company also owns *The Boston Globe* and *The International Herald Tribune*, as well as 17 regional newspapers and eight television stations.

Reuters America LLC is an indirect subsidiary of Reuters Group Plc. Founded in 1851 in London, Reuters serves the

global financial markets and news media with a wide range of information products and transactional solutions. Reuters is also the world's largest international text and television news agency with 2,300 journalists, photographers, and camera operators in 196 bureaus around the world, serving 129 countries, and publishes approximately 30,000 headlines daily, including third party contributions, in 19 languages.

The Society of Professional Journalists is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists, and protects First Amendment guarantees of freedom of speech and press.

The Washington Post is a newspaper with a nationwide daily circulation of over 738,000 and a Sunday circulation of over 1 million.

APPENDIX B

ADDITIONAL COUNSEL FOR AMICI:

Kevin M. Goldberg
Cohn and Marks LLP
1920 N Street, NW, Suite 300
Washington, DC 20036
Attorney for American Society of Newspaper Editors

David Tomlin
The Associated Press
450 W. 33rd Street
New York, N.Y. 10001

Charles Glasser
Bloomberg News
731 Lexington Avenue
New York, N.Y. 10022

David C. Vigilante
Johnita P. Due
Cable News Network LP, LLLP
One CNN Center
Box 105366
Atlanta, GA 30348-5366

Anne Carroll
Daily News, LP
450 West 33rd Street
New York, NY 10001

Karlene Goller
Los Angeles Times Communications LLC

202 West 1st Street
Los Angeles, CA 90012

George Freeman
David E. McCraw
The New York Times Co.
229 W. 43rd St.
New York, N.Y. 10036

Thomas S. Kim
Reuters America LLC
3 Times Square, 20th Floor
New York, N.Y. 10036

Bruce W. Sanford
Robert D. Lystad
Bruce D. Brown
Baker & Hostetler LLP
1050 Connecticut Avenue
Suite 1100
Washington, D.C. 20036
Attorneys for Society of Professional Journalists

Eric Lieberman
The Washington Post
1150 15th Street, NW
Washington, DC 20071

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In the Supreme Court of the United States

SIBEL EDMONDS, PETITIONER

v.

DEPARTMENT OF JUSTICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DOUGLAS LETTER
H. THOMAS BYRON III
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the unavailability of evidence protected by the state secrets privilege required dismissal of this lawsuit.

2. Whether the court of appeals erred in closing oral argument to the public.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 7
Conclusion 16

TABLE OF AUTHORITIES

Cases:

ACLU v. *Brown*, 619 F.2d 1170 (7th Cir. 1980) 13

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970) 13

Bareford v. *General Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992), cert. denied, 507 U.S. 1029 (1993) 10

Black v. *United States*, 62 F.3d 1115 (8th Cir. 1995), cert. denied, 517 U.S. 1154 (1996) 10

Bowles v. *United States*, 950 F.2d 154 (4th Cir. 1991) 10

Clift v. *United States*, 597 F.2d 826 (2d Cir. 1979) 11

DTM Research L.L.C. v. *AT&T*, 245 F.3d 327 (4th Cir. 2001) 11

Ellsberg v. *Mitchell*, 709 F.2d 51 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984) ... 3, 4, 11, 13

Farnsworth Cannon, Inc. v. *Grimes*, 635 F.2d 268 (4th Cir. 1980) 10, 11, 13, 14

Fitzgerald v. *Penthouse Int'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985) 10

Heine v. *Raus*, 399 F.3d 785 (4th Cir. 1968) 11

Cases—Continued: Page

Kasza v. *Browner*, 133 F.3d 1159 (9th Cir.), cert. denied, 525 U.S. 967 (1998) 8, 9, 10

McDonnell Douglas Corp. v. *United States*, 323 F.3d 1006 (Fed. Cir. 2003) 9, 10

Molerio v. *FBI*, 749 F.2d 815 (D.C. Cir. 1984) ... 10, 11

Monarch Assurance P.L.C. v. *United States*, 597 F.3d 1356 (Fed. Cir. 2001) 11

Spencer v. *Kemma*, 523 U.S. 1 (1998) 15

Tenenbaum v. *Simonini*, 372 F.3d 776 (6th Cir.), cert. denied, 125 S. Ct. 605 (2004) 10, 13, 14

Tenet v. *Doe*, 125 S. Ct. 1230 (2005) 12

Totten v. *United States*, 92 U.S. 105 (1876) 12

United States, In re, 872 F.2d 472 (D.C. Cir.), cert. dismissed, 493 U.S. 960 (1989) 6, 8, 11

United States v. *Reynolds*, 345 U.S. 1 (1953) 7, 8, 9, 13, 14

Zuckerbraun v. *General Dynamics Corp.*, 935 F.2d 544 (5th Cir. 1991) 7, 10

Constitution, statutes, regulation and rules:

U.S. Const.:

Amend. I 2

Amend. V 2

Administrative Procedure Act:

5 U.S.C. 551-552 2

5 U.S.C. 701-706 2

Privacy Act of 1974, 5 U.S.C. 552a 1, 2

Regulation and rules—Continued: Page

Exec. Order No. 12,958, 3 C.F.R. 333 (1996) 3

D.C. Cir. Rule 36(c)(2) 15

Fed. R. Civ. P. 56(c) 12

Miscellaneous:

OIG, A *Review of the FBI's Actions in Connection with Allegations Raised by Contract Linguist Sibel Edmonds—Unclassified Summary* (Jan. 2005) 9, 10

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The judgment (Pet. App. 1a-2a) and pre-argument order (Pet. App. 3a-4a) of the court of appeals are unreported. The opinion of the district court (Pet. App. 5a-33a) is reported at 323 F. Supp. 2d 65.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 2005. The petition for a writ of certiorari was filed on August 3, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Sibel Edmonds brought this suit against the Federal Bureau of Investigation (FBI), the Department of Justice, and four government officials in their official capacities for relief under the Privacy Act

of 1974, 5 U.S.C. 552a, the Administrative Procedure Act, 5 U.S.C. 551-552, 701-706, and the First and Fifth Amendments to the Constitution. The complaint alleges that petitioner performed translation services for the FBI from September 2001 until her contract was terminated in March 2002, and made several reports to FBI management of alleged misconduct within the FBI's translator program between December 2001 and March 2002. In petitioner's view, FBI supervisors and managers failed to address her allegations and retaliated against her for reporting her concerns. Pet. App. 5a-10a.

The government did not answer the complaint. Instead, then-Attorney General John Ashcroft invoked the state secrets privilege in a public declaration that was accompanied by classified declarations of the Attorney General and then-FBI Deputy Director Bruce Gebhardt. Pet. App. 16a-17a. The Attorney General asserted the state secrets privilege over "the information underlying this case, including the nature of the duties of plaintiff or the other contract translators at issue in this case," and explained that "further disclosure of [that] information * * * reasonably could be expected to cause serious damage to the national security interests of the United States." *Id.* at 19a (quoting Decl. of Att'y Gen. Ashcroft ¶ 5).

The Attorney General's public declaration explained that he could not publicly make a more detailed explanation of the basis for invoking the state secrets privilege because any such explanation would disclose the very information the privilege is designed to protect. C.A. App. 56. The Attorney General therefore referred the district court to the classified declarations and explained that the information at issue was properly classified un-

der Section 1.3 of Executive Order No. 12,958, 3 C.F.R. 333 (1996). See Pet. App. 6a, 16a-17a; C.A. App. 56. The Attorney General later reaffirmed the classified nature of the information, and formally reasserted the privilege, in a second public declaration. See *id.* at 169-171.

In conjunction with the Attorney General's assertion of the privilege, the government moved to dismiss on the ground that the case could not be litigated without disclosing privileged information, which reasonably could be expected to cause serious harm to national security. The government explained that the privileged information was central to both petitioner's allegations and the government's defenses. See Gov't C.A. Br. 14-15.

2. After full briefing on the motion to dismiss, and after reviewing the classified materials in camera and ex parte, the district court ordered the government to produce another classified declaration explaining "why 'sensitive information [cannot] be disentangled from nonsensitive information,'" and "why the plaintiff is unable to proceed with her claims and why the government cannot defend against those claims without revealing classified information." Pet. App. 35a (quoting *Ellsberg* v. *Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984)) (brackets in original). After the government produced that affidavit, the court upheld the Attorney General's assertion of the privilege and dismissed the complaint. *Id.* at 5a-33a.

The district court found that the Attorney General had properly invoked the state secrets privilege and that the classified declarations demonstrated "the 'reasonable danger' that revelation of classified information would have on both 'intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments.'" Pet. App. 22a (quoting *Ellsberg*,

709 F.2d at 57) (footnotes omitted). The court was "unable publicly to explain [its] conclusion in any more detail," however, because, in light of the classified nature of the privileged information, "[i]t is one of the unfortunate features of this area of the law that open discussion of how the general principles apply to particular facts is impossible." *Id.* at 23a (quoting *Ellsberg*, 709 F.2d at 59 n.41).

The court then considered whether dismissal was necessary. It explained that dismissal is appropriate if the plaintiff is unable to prove a prima facie case or the defendant is deprived of a valid defense due to the exclusion of the privileged evidence, or if the very subject matter of the suit is a state secret. Pet. App. 25a-26a. "Upon conducting a thorough review of the several classified declarations," the court concluded that "the plaintiff is not only unable to prove the prima facie elements of each of her claims without the disclosure of privileged information, but * * * the defendants are unable to assert valid defenses to her claims without such disclosures." *Id.* at 27a.

The court explained in detail why the litigation of each of petitioner's claims would require the disclosure of classified, privileged information by both petitioner and respondents. The court determined that the factors governing petitioner's First Amendment retaliation claim include "whether the plaintiff's speech during the course of her employment was on a matter of public concern, whether a balancing could be undertaken of the government's interest versus the plaintiff's interest in disclosure of this information, whether the plaintiff's speech was the motivating fact for her termination, or whether there were other reasons for her termination." Pet. App. 28a. "[A]ny effort by the plaintiff to establish

these elements or by the defendants to rebut them would risk disclosure of privileged information," the court explained, because "not only is the nature of the plaintiff's employment the subject of the state secrets privilege, but so are the events surrounding her termination." *Ibid.*

Because petitioner's due process claim is based on allegations that defamatory statements were made by respondents, the court concluded that litigating that claim would require petitioner "to refute the allegations made about her." Pet. App. 29a-30a. Petitioner could not do so without revealing privileged information, however, because litigating the truth of those allegations would "necessarily implicate the classified nature of plaintiff's duties with the FBI and the substance of what happened in the underlying dispute." *Id.* at 30a (quoting Resp. Mem. 13).

The court next considered petitioner's Privacy Act claim, which would require her to prove an egregious and unlawful disclosure of information in a system of records pertaining to her job. Pet. App. 30a-31a. Because "documents related to the plaintiff's employment, termination and security review that comprise the system of records are privileged, and because the plaintiff would be unable to depose witnesses whose identities are privileged or to otherwise identify through discovery the individual or individuals who purportedly released the privileged information," the court concluded that petitioner is "unable to proceed with her Privacy Act claims." *Id.* at 31a.

Finally, the court determined that the privileged information could not be separated from the non-privileged information in such a way as to allow the case to proceed, and that there was no alternative to dismissal

that would protect the national security interests of the United States. Pet. App. 32a & n.7. Thus, although it acknowledged that dismissal is "a drastic remedy," *id.* at 31a (quoting *In re United States*, 872 F.2d 472, 477 (D.C. Cir.), cert. dismissed, 493 U.S. 960 (1989)), the court concluded that "the plaintiff's case must be dismissed, albeit with great consternation, in the interests of national security," *id.* at 32a-33a.

3. Petitioner appealed. The court of appeals informed the parties one day before oral argument that only counsel of record would be permitted in the courtroom during argument. Various news organizations moved to intervene and challenged the D.C. Circuit's decision to close the argument. In a brief unpublished order, the court of appeals granted the motions to intervene but denied the requests to open the argument to the public. Pet. App. 3a-4a. Neither petitioner nor the intervenor news organizations sought review of that order from this Court before argument was held.

After hearing argument concerning unclassified matters from counsel of record for both sides, the court of appeals closed the courtroom to all but government counsel and proceeded to inquire about the classified portions of the record. Shortly after the argument, the D.C. Circuit released a transcript of the unclassified portion of the argument.

In an unpublished per curiam judgment, the court of appeals affirmed the judgment of the district court "for the reasons given in that court's opinion." Pet. App. 1a-2a.